STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 18, 2003

TO: ALL PARTIES OF RECORD IN CASE 00-01-001

Decision 03-04-059 is being mailed without the Dissent in part of Commissioner Lynch. The Dissent will be mailed separately.

Very truly yours,

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

Mailed 4/18/2003

Decision 03-04-059 April 17, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Air-Way Gins, Inc., et al., Complainants, vs. Pacific Gas and Electric Company, Defendant.	Case 00-01-001 (Filed January 3, 2000)

OPINION RESOLVING COMPLAINANTS' ELIGIBILITY TO TAKE ELECTRIC SERVICE AT AGRICULTURAL RATES

In this case, we are called upon to decide whether a group of 33 cotton ginners located within the service territory of defendant Pacific Gas and Electric Company (PG&E) are required to take electric service from PG&E under commercial rates, or are entitled to service at the lower agricultural rates PG&E offers pursuant to § 744 of the Public Utilities Code. This requires us to construe the eligibility criterion for PG&E's agricultural tariff, which states in pertinent part:

> "A customer will be served under this schedule if 70 percent or more of the energy use is for agricultural end-uses. Agricultural end-uses include growing crops, raising livestock, pumping water for irrigation, or other uses which involve production for sale, *and which do not change the form of the agricultural product*." (Emphasis added.)

Since there is no real dispute that complainants satisfy the other eligibility conditions, the controlling issue in this case is whether the ginning of cotton constitutes a "change of form" of the raw cotton as it is harvested from the field. PG&E contends that ginning does result in a change of form, because it "invades the corpus" of the cotton plant and results in a change of the texture and appearance of the cotton. Complainants, on the other hand, contend that no change in form occurs, because ginning merely results in the separation of cotton fiber from cottonseed without doing damage to either of them. Both complainants and PG&E contend that their respective positions are supported by our prior opinions in Decision (D.) 97-09-043, *Producers Dairy Foods, Inc. v. PG&E,* 74 CPUC2d 677 (1997) ("*Producers*"), and, to a lesser extent, D.92-02-025, *Harris Farms, Inc. v. PG&E*, 43 CPUC2d 237 (1992) ("*Harris Farms*").

We conclude that the separation of the cotton fiber from cottonseed that takes place during ginning does not constitute a "change of form" within the meaning of PG&E's eligibility statement, and thus that complainants are entitled to service under PG&E's agricultural tariff. As a consequence of this decision, complainants are entitled to a refund of the difference between what they have been billed for ginning under PG&E's commercial tariffs since the Fall of 1996 (when they first asked to be billed at agricultural rates) and what they would have been billed for the ginning under PG&E's agricultural tariffs. According to a stipulation approved in PG&E's bankruptcy proceeding on July 30, 2002, this refund amounts to just under $4.8 million.[1]

[1] *See,* Stipulation Resolving Claims of Cotton Ginning Entities Contained in Omnibus Objection to Certain Claims Pending Before the California Public Utilities Commission and Order Thereon, Case No. 01-30923 DM (Chapter 11 Case), United States Bankruptcy Court, Northern District of California, San Francisco Division, filed July 30, 2002. Two years earlier, at the hearing in this matter on June 20, 2000, PG&E's witness

Footnote continued on next page

Procedural Background

Complainants commenced this proceeding in early 2000. In addition to refunds, they sought an order directing PG&E to place their cotton ginning operations on the applicable agricultural rates.

PG&E filed a timely answer that denied the material allegations of the complaint, asserted various affirmative defenses, and alleged that "cotton ginning involves invading the corpus of the object removed from the plant. Therefore, cotton ginning results in a change in the form of the agricultural product which precludes applicability of PG&E's agricultural rate." (Answer, p. 4.)

A prehearing conference (PHC) was held on March 30, 2000. At the PHC, the assigned Administrative Law Judge (ALJ) noted that complainants were raising an issue of potentially broad applicability, and that the proper forum for

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estimated the amount of refunds that would be due if complainants prevailed at approximately $3 million. Transcript (Tr.), pp. 179-80.

We note that the July 30, 2002 stipulation lists three additional cotton ginners not included in the original complaint. Under the stipulation, PG&E and these three new ginners have agreed to be bound by the outcome of this proceeding or any appeal thereof.

In its December 16, 2002 Appeal of the Presiding Officer's Decision (POD) herein, PG&E asserts that the amount it would be required to refund to complainants in the event they prevail is much larger than the $4.8 million assumed in the POD. PG&E maintains that because of the surcharge on their rates that complainants are now paying as a result of D.01-05-064, the amount that would have to be refunded to them on a one-time basis is approximately $14 million. (PG&E Appeal, p. 7, n. 3.) The reason for this, PG&E states, is that the July 30, 2002 stipulation in the bankruptcy proceeding does not include the rate surcharge increases that have accumulated since the bankruptcy filing on April 6, 2001. (*Id.* at 21, n. 8.)

In their response to the appeal, complainants note that six of the cotton ginners who originally joined in this case have gone out of business and ceased ginning operations, and that as a result of this, the amount of the one-time refund due the complainants is approximately $7 million. (Complainants' POD Response, p. 28, n. 31.)

considering the general question of eligibility for PG&E's agricultural rates was Application (A.) 99-03-014. Therefore, the ALJ continued, the scope of this case would be limited to determining whether the complainants were entitled to service under PG&E's existing agricultural tariffs, and whether they were entitled to refunds for the three-year period at issue. A hearing was scheduled, and due dates for the submission of opening and rebuttal testimony were also set.[2]

Pursuant to this schedule, the parties submitted opening testimony on April 18, 2000, and reply testimony on May 19. The hearing was held on June 19-20, 2000. Pursuant to the ALJ's direction at the hearing, opening briefs were filed and served on July 27, 2000, and reply briefs on August 18, 2000. On February 8, 2001, the Commission issued D.01-02-038, which extended the 12-month deadline for the case pursuant to § 1701.2(d) of the Public Utilities Code.

A POD ruling in favor of complainants was mailed to the parties on November 15, 2002. On December 16, 2002, PG&E filed a timely appeal of the POD, pursuant to Rule 8.2(c) of the Commission's Rules of Practice and Procedure. After being granted a one-week extension of time by the ALJ, complainants filed their response to PG&E's appeal on January 7, 2003. To the extent we consider it necessary, we address PG&E's arguments on appeal at appropriate points in the text of this decision.

[2] The procedural schedule and the ALJ's rulings on the scope of the proceeding were memorialized in a scoping memo. The scoping memo also designated the ALJ as the Presiding Officer. *See*, Joint Assigned Commissioner and Administrative Law Judge's Ruling and Scoping Memo, issued April 24, 2000.

The Organization of the Cotton Industry in California

At the hearing, the parties devoted much of their attention to the question of whether the physical processes involved in cotton ginning result in a "change of form" of the seed cotton (*i.e.*, cotton as it is harvested from the field, with seeds and debris embedded in the fiber). A related question was whether seed cotton should be considered a separate market (as PG&E contends), or whether the only real agricultural market for cotton in California is for ginned cotton (as complainants contend). Because the parties devoted so much time to these issues, it seems advisable to begin our discussion with a brief description of the cotton industry in California, along with a description of the physical steps involved in cotton ginning.

The following descriptions of the California cotton industry and of cotton ginning are based on testimony presented by both sides. The facts below are uncontested, although their significance is hotly debated.

Cotton is a significant crop in California, although less plentiful than it used to be. According to the National Cotton Council of America, the value of the cotton grown on California farms in 1997 was nearly $808 million, or about 13% of the total grown in the United States for that year. If the value of cotton ginning is included along with the farming (as complainants assert it should be), then California production in 1997 was still about 13.2% of the U.S. total. Based on the total revenue of cotton production businesses (including farming, ginning, cotton merchants, warehouses, and cottonseed oil and textile mills), California is the fifth largest producing state in the United States, accounting for slightly more than 8.5% of total U.S. revenue. (Exhibit 13, Attachment F).

Despite these impressive statistics, cotton production in California is declining. According to the testimony of Earl Williams, president of both the

California Cotton Growers Association and the California Cotton Ginners Association (and a witness on behalf of complainants), cotton production in California declined 22.9% between 1979 and 1997, even though yields per acre increased. (Ex. 1, p. 2.) California today produces 2.1 million bales of cotton; at its peak in the late 1970s, the state produced about 3.5 million bales. (Tr. 33-34.)[3] Williams acknowledged that a number of factors besides power costs are responsible for this decline, including California's higher labor costs, relatively lower federal cotton subsidies, and the relative ease with which California farmers can switch to higher value crops such as fruits, vegetables and nuts. (*Id.* at 25-26.)

California farmers tend to grow more commercially attractive varieties of cotton. For example, 85% of all the pima cotton grown in the United States is raised in California, even though it has lower yields, a longer growing season, and requires special "roller" gins. Pima cotton is exported mainly to Pacific Rim countries, where it is woven into higher-value textiles. (*Id.* at 27-28.)

Whatever variety it is, the cotton grown in the field is harvested using either "spindle" pickers or "stripper" pickers. Spindle pickers pick the cotton in rows and are able to take the cotton from open bolls. They are used to harvest between 95% and 98% of the cotton grown in California, even though they cost about twice as much as stripper pickers. The latter take all of the plant mass, resulting in more trash (especially leaves and twigs) and making it harder to separate the seed from the lint. Stripper pickers are used to harvest only about two percent of California cotton. (*Id.* at 20-21.)

[3] There has also been a decline in the number of gins. In 1963 California had 300 cotton ginning facilities; today it has 90, of which only 79 operated in 1999. (Tr. 33.)

Once the seed cotton has been harvested, it is placed in a "module builder" or cotton trailer for transport to the ginning site. According to complainants' witness John Toscano, when the seed cotton arrives at the site, it is stored in a block measuring eight by eight by thirty feet until it is ready for ginning. (Ex. 4, p. 1.)

Although seed cotton can be stored for a few weeks or months (depending on moisture content and weather conditions), the increase in moisture brought about by decomposition of the leaves, twigs, cottonseed and bolls in the cotton mass requires that ginning be done promptly. Without prompt ginning, the increase in moisture brought about by this decomposition can cause the cotton fiber to discolor and decompose, and the cottonseed to rot and (in some cases) germinate. (*Id.* at 3-4.)

Seed cotton enters the gin either through suction tubes or a conveyor belt. The first step is to blow warm air through the seed cotton, which reduces its moisture content and enables some of the dirt, leaves and other debris to fall out, since debris tends to stick to overly moist cotton fibers. The second step is to remove more debris through two methods: (1) conveying the cotton mass rapidly through a series of bars, a process that essentially bangs the seed cotton around, and then (2) using centrifugal force to sling off twigs and other heavy debris. In both of these procedures, more warm air is blown through the cotton mass to remove dirt and fine debris. (*Id.* at 2.)

The partially cleaned cotton mass then goes to the "gin stand," where the cotton fiber is separated from the cottonseed. This is accomplished through the use of either "saw" gins or "roller" gins. The former use rotating saws to grasp and pull the cotton fiber through narrowly-spaced ribs. Since the cottonseed is too large to pass through the ribs, it drops out the bottom and is conveyed to a seed pile or truck. With roller gins, on the other hand, the seed cotton adheres to

a roller and as it passes over the roller, is met by a stationary bar and a rotary blade that gently "pinches" the cottonseed out of the cotton mass. (*Id.*)[4]

After the ginning is completed, the cotton fiber goes through a set of combs that clean it further, and then it is deposited in a press. The press compresses the fiber into standard bales of 500 pounds each that are graded according to standards promulgated by the U.S. Department of Agriculture (USDA).[5] The graded bales are then sold to a cotton merchant. Cottonseed, on the other hand, is sold either to feed mills for use as livestock feed, or to oil mills that produce cottonseed oil. (*Id.* at 3-4.)

Toscano testified that in California, the grower retains title to the cotton until after it is ginned. (*Id.* at 4; Tr. 81-82.) A corollary of this, which PG&E's witness conceded, is that unlike gins in some other areas of the United States, most of the cotton gins in California are grower-owned cooperatives. (Ex. 14, p. 4.) Williams testified that he could think of only two California gins (out of 90) that are not cooperatives, and that only about 300 of the 2600 cotton growers in California use these independently-owned gins. (Tr. 15.)[6]

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[4] According to Earl Williams, pima cotton requires the use of roller gins. (Tr. 27.) Of California's 90 cotton gins, only 18 are roller gins. (*Id.* at 23-24.)

[5] The USDA standards measure the following characteristics of the cotton fiber: length, thickness, strength, color, uniformity of fiber length, and stickiness (a characteristic that measures the presence of aphids and whitefly on the fiber). In addition, the USDA grades the trashiness of the cotton bale, which measures the quantity of leaves, sticks and other debris left in the bale. (*Id.* at 3.)

[6] According to Toscano, the status of the gins as nonprofit farmers' cooperatives means that they do not pay taxes. Moreover, they charge for ginning on a per-bale basis, and if there are any surplus funds left at the end of the relevant accounting period, a dividend is returned to the members of the cooperative. (Tr. 42-45.)

Complainants' Position

Based on the facts set forth above, complainants argue that they are entitled to be served under PG&E's agricultural tariffs. Complainants reason that because the change-of-form language in PG&E's tariff eligibility statement is ambiguous, one must turn to Commission decisions and to the legislative intent behind Pub. Util. Code § 744 in deciding how to interpret the tariff.[7] Complainants conclude that under the Commission's analysis in *Producers* -- which decided that fluid milk processing qualifies for agricultural rates -- it is clear that cotton ginning also qualifies for such rates, because cotton ginning, like fluid milk processing, does not change the form of the raw agricultural product.

Before analyzing *Producers*, complainants argue strenuously that a common-sense analysis of what occurs in cotton ginning makes it clear that this

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[7] Pub. Util. Code § 744 directs all electrical corporations including PG&E to file tariffs with the Commission for optional interruptible service and optional off-peak demand service for "agricultural producers," which are defined under § 744(a) as "any person or corporation whose principal purpose is the agrarian production of food or fiber."

Since none of the complainants in this case take interruptible service for their cotton ginning operations, the relevant provision is § 744(c), which sets forth the requirements for the optional agricultural off-peak demand tariff. § 744(c) states that this tariff shall provide for "time-differentiating meters or other measurement devices," and shall be "reasonable in relation to the needs of the electrical corporation for reduction in demand to meet system peak requirements and the burdens imposed upon the agricultural producer of scheduling its operations to coincide with the periods of off-peak demand." § 744(c) also directs the Commission to ensure that the off-peak agricultural tariff is "composed of a two-part time differentiated schedule consisting of on- and off-peak rates," and that the rate for this service is established "at an appropriate discount from the system average rate, which shall be not less than the cost of furnishing this service."

§ 744 has resulted in significantly lower rates for qualifying agricultural customers. According to D.01-05-064, average rates for agricultural customers are 14.2¢/kWh, whereas the average rate is 15.4¢/kWh for large commercial customers, and 16.7¢/kWh for small commercial customers.

case involves no change of form. Complainants argue that all ginning does (apart from some cleaning) is to separate the cotton fiber from the cottonseed without damaging either, and that the cottonseed and fibers that exit the gin are "the same in all respects" as the fiber and seeds that enter the gin. Both before and after ginning, complainants continue, the appearance of the cotton fiber and cottonseed is the same, and their USDA characteristics are the same. (Complainants' Opening Brief, pp. 3-4.) Moreover, Toscano notes, cotton ginning is seasonal work that is tied to the cotton harvest. (Ex. 5, p. 2.)

Complainants also argue that, quite apart from these common-sense considerations, the analysis in *Producers* entitles them to relief. In *Producers,* the Commission held that the pasteurizing, homogenizing, vitaminizing and standardizing of the fat content of milk produced by the dairy's own cows (as well as milk purchased from others) did not disqualify the dairy from taking service under PG&E's agricultural rates, because no change in the form of the milk products had occurred. Complainants argue that in reaching this conclusion, "*Producers* viewed the raw milk not as a single whole, but as an aggregation of various individual milk products (cream, whole, lowfat, nonfat), each of which already existed *within* the raw milk." (Complainants' Opening Brief, p. 4.) *Producers* likened milk processing to activities such as the sorting of eggs, which results in containers of eggs that are uniform in size (a difference from the randomly-sized eggs laid by the hen), but which does not change their form. Complainants continue:

> "Like the sorted eggs and processed milk in *Producers,* the seed cotton contains within it multiple agricultural products: seed and fiber. Like the sorted eggs and standardized milk products, the seed and fiber are not 'created' by ginning but are merely separated into different packages. Like the sorted eggs and processed milk, the seed and fiber have not changed in form." (*Id.* at 5-6.)

Complainants also argue that the emphasis in *Producers* on practical marketing considerations supports extending agricultural rates to cotton ginning. They note that while significant markets exist for both cotton fiber and cottonseed, there is no market at all for unginned cotton (*i.e.,* seed cotton). They point to the following language in *Producers* on the relevance of marketing considerations:

> "The processes used by Producers are necessary in order to realistically market the milk in the quantities Producers handles. [PG&E's witness] states that the milk could be sold for purposes other than direct human consumption, but offers no evidence that such markets exist for the quantities involved here . . . Eggs, too, perhaps could be sold in random size and quality, but practical marketability may deem otherwise. Regardless, we do not believe that the intent of the legislature was to force milk producers to find less viable markets in order to benefit from AG rates." (74 CPUC2d at 681.)

Complainants also point to what they say are numerous inconsistencies in PG&E's interpretation of its agricultural tariff. PG&E concedes that waxing apples, cutting the tops off of carrots, removing the stems from sun-dried raisins and washing potatoes and carrots all qualify for agricultural rates, even though these activities all result in some change in the form of the agricultural product. Since ginning results in the separation from the cotton mass of seed that is embedded within the cotton fiber, but does not otherwise change the appearance of the seed or fiber, complainants ask why ginning should not also qualify for agricultural rates. (Ex. 8, pp. 9-10.) They do not accept PG&E's argument that apple waxing, carrot topping, etc. result in only a "*de minimis*" change in the form of these crops, and thus should be ignored for purposes of interpreting the tariff.

Finally, complainants attack PG&E's argument that the issue of whether there has been a change of form in an agricultural product should be decided by

determining whether a process "invades the corpus" of the harvested plant. On this issue, complainants state:

> "[T]his 'de minim[i]s'/'invade the corpus' requirement is based on language that PG&E *manufactured* for purposes of this case. It does not appear in any statute, tariff, Commission decision, or even PG&E's own Tariff Application Guide. And while PG&E attempts to characterize 'invade the corpus' as a restatement of the tariff, it is really the articulation of a narrow *exception* to the tariff, an exception that only applies to ginners and hullers. No other products are denied agricultural rates based on an alleged 'invasion of the corpus'." (Complainants' Reply Brief, pp. 4-5; footnotes omitted, emphasis in original.)

PG&E's Position

PG&E takes the position that cotton ginning is a type of agricultural processing that results in a change of form of the seed cotton, and therefore is not eligible for agricultural rates. PG&E's witness, Renee Jolivette, summarizes her position as follows:

> "While cotton growing and cotton ginning are industries that are closely linked from an economic standpoint, they are nevertheless two distinctly different enterprises and activities. Cotton growing is agricultural production. Cotton ginning is agricultural processing. Ginning changes the form of the harvested cotton crop and is therefore not an agricultural end use for the purpose of applying the agricultural rates." (Ex. 14, p. 1.)

Jolivette begins by describing how PG&E's agricultural tariffs have evolved over the years. She points out that from 1952 to 1986, most agricultural service was furnished under tariffs known as PA-1 and PA-2, which contained an eligibility statement limiting them to "reclamation service and to general agricultural service on the farm." In mid-1986, a task force including representatives of major California farm organizations was formed for the

purpose of reviewing the eligibility statement. (Ex. 13, p. 2.) Jolivette summarizes the results of the task force's work as follows:

> "D.88-12-031 specifically eliminated from the agricultural rate classification any processing enterprises, by excluding enterprises which 'change the form of the agricultural product.' Prior to D.88-12-031, PG&E's agricultural rates were only applicable to 'general agricultural service on the farm.' D.88-12-031 resolved inequities created by the previous language, by allowing parity for enterprises, such as those engaged in the cleaning, packing, and storage of fresh produce, regardless of whether or not these activities occurred on the farm." (Ex. 13, p. 3.)[8]

PG&E argues that its interpretation of its agricultural tariff is supported by the Standard Industrial Classification (SIC) Manual of the U.S. Occupational Safety and Health Administration (OSHA). According to Jolivette, the SIC Manual draws a clear distinction between agricultural *production* (such as the growing of crops or livestock) and agricultural *services*, a category that includes post-harvest crop services such as bean cleaning, corn shelling, grain grinding and seed cleaning (as well as soil and veterinary services). (*Id.* at 8-9.) Although Jolivette acknowledges that PG&E's treatment of agricultural services began to diverge from the SIC Manual with the elimination of the on-the-farm/off-the-

[8] Jolivette's description is consistent with the following description of the task force's work in *Harris Farms*:

> "The purpose of the working group was to address the definition of agricultural uses to eliminate customers who are not agricultural, and those commercial enterprises who process an agricultural product for commercial sale. The latter are usually stand-alone operations that purchase agricultural commodities and change their form, such as processors of tomato sauce, tomato paste, and tomato juice." (43 CPUC2d at 238.)

farm distinction (*id.* at 10-11), she argues that "cotton ginning is a post-harvest crop service, which, like corn shelling, changes the form of the product and therefore is not considered an agricultural end-use." (*Id.* at 11.) She maintains that cotton ginning is akin to the removal of seeds from flowers or plants, an activity the SIC Manual treats as a post-harvest agricultural service:

> "Establishments which grow crops for the ultimate use of the seeds from the crop are classified in the 'Crop Production' group of the SIC code system. However, the removal of seeds from a flower or vegetable is a post-harvest process. Establishments which remove seeds from flowers and vegetables, thereby changing the form of the flower or vegetable, are not considered agricultural for the purpose of applying agricultural rates. They are classified in the SIC Code Manual as post-harvest 'Agricultural Services'." (*Id.* at 9; footnote omitted.)[9]

PG&E dismisses complainants' argument that ginning merely results in the separation of cotton fiber from cottonseed, without changing the form of either. On this question, PG&E states:

> "[Complainants concede that] cottonseed is contained within the seed cotton mass . . . [They also acknowledge that] cotton fiber and cottonseed are attached and the cotton fiber grows from the exterior of the cottonseed . . . The Complainant claims that the gin saws 'do not intrude into either the seed or the fiber' . . . It is difficult to imagine how this is accomplished since [complainants also concede that] 'cottonseed is not even visible as it sits in the seed cotton mass' . . . The corpus of the seed cotton must be invaded to tear the cottonseed from the seed cotton mass. One can hardly question whether removing the interior or core of a plant product changes its form. This is a

[9] Although Jolivette does not mention it in her testimony, the OSHA website indicates that cotton ginning has been assigned code 0724 in the 1987 SIC Manual, which means that it falls within the "crop services" industry group. *See,* www.osha.gov/oshstats/.

> drastic change in form, analogous to the pitting of a peach, and was clearly intended to be excluded from the agricultural rates." (PG&E Reply Brief, p. 8.)

PG&E also argues that complainants are ignoring the relevant issue when, based on their reading of *Producers*, they contend that the cotton fiber and cottonseed that emerge from ginning are the same "in all respects" as the fiber and seed that enter the gin. In PG&E's view, both the discussion in *Producers* and the differences between milk processing and cotton ginning demand a different conclusion:

> "The Complainant still makes the false assumption that the relevant comparison in the 'change in form' analysis is between the cotton fiber before and after ginning and the cottonseed before and after ginning . . . This is not the proper comparison. The only comparison that gives the tariff meaning is between the harvested object, seed cotton, and the products of cotton ginning, cotton fiber and cottonseed.
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> "Cotton ginning cannot be analogized to milk processing. Every element present in raw milk is present in the various milk products, the only difference being the level of fat content. Conversely, the elements of seed cotton are completely disassociated from one another during the ginning process. Cotton ginning separates cotton into its component parts, cotton fiber and cottonseed. Neither cotton fiber nor cottonseed are [as the Commission said of the milk products in *Producers*,] 'identical to portions of the raw product.'" (PG&E Reply Brief, pp. 3-5.)

PG&E also argues that complainants' reliance on the discussion of practical marketability in *Producers* is misplaced, and that the absence of a market for unginned cotton is irrelevant in deciding whether agricultural rates should apply to ginning. On this issue, Jolivette states:

> "While [complainants] testif[y] that the seed cotton itself is not traded commercially, this does not alter the fact that ginning is not an agricultural end-use because it changes the form of the seed cotton. The point at which a processed commodity is sold is not a consideration when applying the agricultural rates. The applicability statement does not define agricultural end-uses as all activities which take place prior to the commercial sale of a processed product. It does define agricultural end-uses as activities which are involved in the production for sale of a crop which do not change the form of the agricultural product. Just because the crop in this case -- the seed cotton -- is not itself sold commercially does not change the applicability of the agricultural rate." (Ex. 14, pp. 1-2.)[10]

Finally, PG&E argues that it is not acting inconsistently by refusing to apply agricultural rates to cotton ginning while extending them to activities such as waxing apples, removing the tops from carrots, de-stemming raisins, and removing leaves and stems from various fruits and vegetables. Each of these activities can be "meaningfully distinguished" from cotton ginning, according to PG&E:

> "As decided by the Commission in *Producers Dairy*, standardizing milk does not change the form of the milk . . . Cutting the green leafy top from a carrot is simply a cleaning process. Removing leaves from bunches of grapes, removing the stem from the raisin, and removing stems from fruits and vegetables are also debris removal and cleaning processes. Waxing apples, like de-stemming and cleaning, is merely a cosmetic function which does not change the form of the apple.

[10] In its reply brief, PG&E suggests that if the Commission considers when title to a crop passes in deciding whether a particular activity is eligible for agricultural rates, growers and processors will be tempted to manipulate the manner in which growing and processing are organized in order to take advantage of agricultural rates. (PG&E Reply Brief, p. 6.) However, PG&E presented no evidence that such manipulation has occurred in this case.

> Cotton ginning is not analogous to these processes. Unlike these examples, the ginning process is not merely a cleaning or de-stemming process, but involves the physical separation of two separate and distinct products, one located inside the other, cotton fiber and cottonseed." (PG&E Reply Brief, p. 9.)

Discussion

Based on our review of the record, we agree with complainants that PG&E's agricultural tariffs as currently written should apply to cotton ginning. Despite PG&E's characterization of the ginning process as a "disassociation" or "tearing away" of cotton fibers from cottonseed, it seems clear -- when rhetoric is put aside -- that what happens during ginning is a separation of these two products, without damage being done to either of them. Ginning does not require that the cotton fiber or cottonseed be severed, crushed or cut into, all of which are processes that would seem to come within a common-sense definition of a "change of form".

We are forced to acknowledge, however, that we have not reached our conclusion easily, or because PG&E failed to present any arguments for ruling the other way. As is made clear by Jolivette's review of the history of PG&E's agricultural tariffs, the change-of-form language was adopted in 1988 to address the agricultural working group's perception that inequities had resulted from the "on the farm/off the farm" distinction in the previous tariff eligibility statements. Even though the new tariff's reference to a "change of form of the agricultural product" seems imprecise and subjective, there was apparently a consensus that lasted for nearly a decade about which activities this language was intended to cover. Unfortunately, that consensus began to fray in the mid-1990s, and since then the Commission has had to decide at least two cases (*Producers* and this one) in which the principal issue has been what constitutes a change of form of the relevant agricultural product.

As a result -- and as indicated by the summary of the parties' positions set forth above -- the debate in these cases has sometimes taken on a metaphysical tone, which in turn makes it difficult to determine just what the ground for decision has been. Unfortunately, PG&E's appeal from the POD continues in this metaphysical tradition, because PG&E has simply been unwilling to acknowledge the lack of clarity in its eligibility statement,[11] or to admit that facts about cotton ginning and other processes that it has characterized in one way can just as easily (and often more convincingly) be characterized in another way. Although PG&E has attempted to cloak its appeal in the language of administrative law, it is clear that many of its arguments simply represent

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[11] For example, PG&E continues to argue in its appeal, as it did in its briefs, that the language of the tariff eligibility statement is clear, and that the POD's interpretation of this language renders it meaningless. The following argument (about which we will have more to say later in the text) is typical:

> "[T]he POD misinterprets the Tariff and falsely concludes that the relevant comparison in the 'change of form' analysis is between the raw, harvested cotton's constituent parts . . . before and after ginning. This is not the proper comparison. The only comparison that gives the tariff meaning is between the raw, harvested seed cotton and the products of cotton ginning, cotton fiber and cottonseed. The 'change of form' undergone by the raw, harvested cotton when it is separated into its constituent parts is clear and unambiguous." (PG&E Appeal, p. 11; footnote omitted.)

In making such arguments, PG&E not only ignores the delphic quality of the change-of-form language, but conveniently overlooks the position it took on this same issue in A.99-03-014. In that proceeding, PG&E proposed a two-page agricultural eligibility statement that it said was intended to "clarif[y] that the end-uses sought by various parties but opposed by PG&E are to be excluded from agricultural eligibility." The full text of this revised eligibility statement, which PG&E proposed in Chapter IV of the March 9, 2000 update to its Phase II Rate Design testimony in A.99-03-014, is set forth in Appendix A to this decision.

disagreements with the POD about where, on undisputed facts, a particular line should be drawn in this tariff interpretation case.[12]

Despite our disappointment with PG&E's arguments on appeal from the POD, we begin with the observation that PG&E has a stronger argument that cotton ginning constitutes a change of form in the agricultural product than was true of the fluid milk processing in *Producers*. Unlike milk processing, ginning results in a clear physical and visual separation of the cotton fiber and cottonseed, making it more difficult than in *Producers* to reunite these two products into their original, raw form. It also appears to be true that unginned cotton decomposes less rapidly than unpasteurized milk, so the argument that ginning is necessary to preserve the cotton for market is somewhat weaker than

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[12] For example, PG&E devotes several pages of its appeal to arguing that the POD has drawn an arbitrary distinction between the processes that separate cotton fiber and cottonseed during ginning (which the POD concluded are not a change of form), and processes that "sever, crush or cut into" an agricultural product (which the POD concluded would be a change of form). PG&E maintains that "these types of processes cannot be meaningfully distinguished from one another, as in both types the results are the same -- the corpus of a harvested object is invaded and its core/insides are removed." (PG&E Appeal, p. 14.) PG&E also argues that cotton ginning does result in severing, because "the seeds removed from the cotton contain a readily visible cotton residue, which demonstrates that the cotton fiber has in fact been torn away and damaged in the seed removal process." (*Id.* at 15.)

These arguments ignore the common-sense point (which was amply made in the POD and which we accept here) that even though the cotton fibers grow out of the cottonseed, and that separating the fiber from the seeds requires some “tearing” or “disassociation” that leaves a residue, both the seed and the fiber emerge intact from the cotton ginning process. Thus, even if it can be said to involve severing or tearing, the ginning process seemed less drastic a change to the ALJ (and to us) than the removal of leaves and cutting tops off of carrots that PG&E treats as eligible for agricultural tariffs. The fact that PG&E disagrees with the judgments made in the POD about how to characterize these physical processes does not mean that these judgments are arbitrary, capricious, or lacking in evidentiary support. Rather, these judgments are the kinds of line-drawing exercises that have to be made in tariff interpretation cases.

the argument in *Producers* that pasteurization and other processing is necessary to keep milk in a marketable form. Finally, PG&E is surely correct in arguing that when the Legislature enacted Pub. Util. Code § 744, it did not intend agricultural rates to be available to broad groups of agricultural processors,

because of the effects such eligibility would have on revenue allocation. (Ex. 13, pp. 13-15.)[13]

However, the force of these arguments is overcome by others that seriously undercut PG&E's position. The first and most obvious is that PG&E extends agricultural rates to many cleaning and storage processes that a reasonable person would consider a change of form of the relevant agricultural product. This is true of the carrot topping, raisin de-stemming, and leaf removal that were referred to so frequently in the parties' testimony. PG&E's attempts to justify these deviations from its otherwise rigid interpretation of the change-of-form language as "*de minimis*," "cosmetic," or as merely facilitating the storage of produce, are unconvincing.[14]

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[13] As Jolivette points out in her direct testimony, the legislative history of AB 44 and of AB 174, both of which were enacted in 1986 and sponsored by the same member of the Assembly, draw a clear distinction between agricultural production and processing. (Ex. 13, pp. 13-15.)

[14] In its appeal, PG&E states that "it defies common-sense to assume, as the POD does, that a reasonable person, shown an apple and a waxed apple, or a carrot with a top and one without, would say that a change of form had occurred. " (PG&E Appeal, p. 16.) However, these were precisely the conclusions the Commission reached in *Producers*:

> "We find PG&E's reasoning to be inconsistent. On the one hand[,] even though the processed milk cannot be distinguished from raw milk by sight or smell, the form of the product nevertheless has been changed, in [PG&E's] view. On the other hand, according to [PG&E witness] Langiano, carrots can be topped and yet qualify [for agricultural rates,] even though PG&E acknowledges that the form has been changed. That change in form is obvious, since topped carrots have a different appearance than carrots with tops . . ." (74 CPUC2d at 680.)

See also, id. at 681 (noting that from the waxing of apples, "one might conclude that waxing apples changes the form of the agricultural product by adding wax, or by making the apples shinier.")

Second, we are not convinced by PG&E's argument that cotton ginning can be most closely analogized to removing the pits from peaches or apricots, a process that clearly "invades the corpus" of the fruit and changes its form. As noted above, it is clear from the record that cotton ginning is essentially a separating and cleaning process; it does not require that the cotton fiber or cottonseed be severed, crushed or cut into.[15]

Third, although it is not dispositive, we agree with complainants that under PG&E's tariff, in determining whether a change in form of an agricultural product has occurred as the result of a particular process, our prior decisions support a before-and-after comparison of the agricultural product's constituent parts -- in this case, cotton fiber and cottonseed -- rather than requiring that the comparison be limited to the before-and-after condition of the raw product as it is harvested from the field.[16]

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[15] Because of our conclusion that cotton ginning is essentially a separating and cleaning process, technically we do not need to decide whether PG&E's "invade the corpus" test is a reasonable one for determining whether a change of form has occurred. However, in view of the cross-examination concerning this matter, we think it is appropriate to make a few observations.

First, we agree with complainants that PG&E witness Jolivette seemed unsure of just what the "invade the corpus" test would encompass. (Complainants' Opening Brief, p. 11, n. 5.) Although she seemed to testify at first that she would find a change of form if there was *either* an invasion of the corpus of the agricultural product *or* a change in the product's appearance, texture, taste or smell, she later agreed that this was too broad, because it could cover fluid milk processing, where it is clear that no invasion of the corpus occurs. (Tr. 114-116.) Despite the ambiguities in Jolivette's testimony, we tend to agree with PG&E that, as the discussion in the text indicates, obvious invasions of the corpus of an agricultural product, such as animal slaughtering and peach pitting, constitute a change in form of the product.

[16] We reach this conclusion for two reasons. First, the language of *Producers* supports complainants on this question. *See*, 74 CPUC2d at 681 ("Grading and separating eggs by size results in containers of eggs, each of which is different in size than the average size

Footnote continued on next page

PG&E also exaggerates when it argues that if complainants' position were accepted, processing activities such as cattle slaughtering would be eligible for agricultural rates.[17] The slaughtering of animals obviously represents a change of

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of eggs from the hen, quite the same as processing milk results in various products, many of which have fat contents different than the average fat content in raw milk from the cow. Both the resulting egg and milk products are identical to portions of the raw product. We fail to see any distinction between sorting eggs and standardizing milk, as regards change in form of the product.")

Second, we agree with complainants that there is no merit in PG&E's argument that unless the before-and-after comparison is restricted to seed cotton as a whole, the singular term "product" in the tariff eligibility statement will be rendered meaningless. (PG&E Appeal, p. 4.) As complainants point out, "common usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future application." (Complainants' POD Response, p. 12, n.11, quoting *Sutherland, Statutory Construction,* Vol. 2A at §47:34.) Applying this rule of statutory construction, the California Supreme Court has recently reiterated that in laws such as statutes, regulations or tariffs, "the singular includes the plural, and the plural number includes the singular." *Snukal v. Flightways Manufacturing, Inc.*, 23 Cal.4th 754, 778 n. 7 (2000) (holding that the phrase "signing officers" in Corporations Code § 313 does not require two separate officers to sign a document when one person holds both corporate offices.) Thus, the fact that the singular term "product" is used in PG&E's tariff eligibility statement does not preclude comparing the constituent parts of seed cotton (cotton fiber and cottonseed) before and after ginning.

[17] For example, in attacking the complainants' argument that cotton fiber and cottonseed cannot realistically be produced for sale unless they undergo ginning, PG&E states:

> "[The tariff phrase 'other uses involving production for sale'] cannot be interpreted to expand the applicability of the agricultural tariffs to all activities necessary to prepare a product for sale. If that were the case, then slaughterhouses and orange juice factories would be eligible for rates under the agricultural tariffs because beef cannot be 'produced for sale' unless beef cattle are slaughtered and orange juice cannot be 'produced for sale' until the orange juice is squeezed." (PG&E Opening Brief, pp. 4-5.)

See also, Ex. 13, p. 7. In addition to the obvious hyperbole, this passage and others from PG&E fail to address complainants' position. Complainants' witness Kerkorian argued in his rebuttal testimony that cattle slaughtering could not be analogized to cotton

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form of the affected livestock, and so is ineligible for agricultural rates under PG&E's tariffs. As the POD in Case 00-01-021, *Zacky & Sons Poultry Co.* v. *Southern California Edison Company*, recently said in rejecting the suggestion that *Producers* supported the extension of agricultural rates to a chicken slaughtering facility located in Edison's territory, "*the form of the chickens is changed* at the . . . facility because the chickens are killed, plucked, have body parts removed, and are placed on ice . . . " (August 6, 2001 POD, p. 10, n. 13.)

PG&E's attempt to justify its treatment of cotton ginning on the basis of how this and other activities are classified under the SIC codes is also unavailing, because PG&E concedes that since the agricultural tariff language was changed in 1988, its treatment of a number of agricultural processes has begun to diverge from how they are treated under the SIC Manual. Jolivette acknowledged that after PG&E's tariff language was changed pursuant to D.88-12-031, agricultural rates were extended, despite the SIC classifications, "to post harvest crop services which occurred off the farm, so long as those services did not change the form of the product." (Ex. 13, p. 10.) She also acknowledged that in the years since 1988, the divergence between the treatment of certain processes under the SIC codes and under PG&E's agricultural tariff has grown somewhat. (*Id.* at 10-12.)

Finally, we find no merit in PG&E's arguments that practical marketing considerations were not relied upon in *Producers*, and should also not be a factor here. Although the decision in *Producers* was based primarily on the fact that

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ginning because (1) title to cattle usually passes before they are slaughtered, whereas title to cotton typically does not pass until after ginning, (2) slaughtering involves major cutting of the animal's carcass, whereas ginning merely separates the cotton fiber from cottonseed, and (3) slaughtering transforms a living commodity into a dead one, whereas seed cotton is already dead before it is ginned. (Ex. 8, p. 17.) PG&E did not address these common-sense distinctions.

pasteurization and other processing did not change the form of the raw milk, the decision clearly states that such processing is "necessary in order to realistically market the milk in the quantities Producers handles," and that the Commission did not believe the legislature intended to force dairy producers to sell their product into the small niche market for raw milk in order to benefit from agricultural rates. (74 CPUC2d at 681.) Thus, *Producers* supports complainants' argument that in determining when "production for sale" stops and processing begins under PG&E's agricultural tariff, the nature of the actual markets for the products, not theoretical markets, should be taken into account.[18]

Here, although PG&E argues that the market for unginned cotton "has simply been internalized by cotton growers" through their use of cooperative gins, and that unginned cotton could theoretically be sold to independent ginners, PG&E does not dispute complainants' evidence that there is no actual market for seed cotton in California. (PG&E Opening Brief, p. 11.) Moreover, in view of the evidence that seed cotton begins to decompose if not ginned within about a month, PG&E does not appear to be arguing that it would be feasible to sell California seed cotton to out-of-state ginners. Under these circumstances, we agree with complainants that ginning should be considered part of the "production for sale" of cotton as a crop, and that because ginning does not

[18] We note that in their opening brief, complainants claim they are arguing only that practical marketing considerations should be taken into account, not that they are determinative:

> "Complainants do not suggest that the question of 'marketability' should replace the primary inquiry concerning the 'change of form' of the product. Instead, 'marketability' should inform and influence that inquiry." (Complainants' Opening Brief, p. 6, n. 3.)

change the form of the seed cotton in a way that irremediably damages or changes its constituent parts, it qualifies for PG&E's agricultural rates. [19]

As noted in the introduction, because of our ruling that complainants are entitled to be served under agricultural rates, they are entitled to a refund of the difference between what they were billed for the ginning under PG&E's commercial tariffs and what they would have been billed for this service under PG&E's agricultural tariffs. As noted in *Producers,* complainants are entitled to

[19] In view of our holding today, we need not reach complainants' alternative argument that cotton ginning qualifies for PG&E's agricultural tariffs because, under *Harris Farms,* it can be considered "necessary and integral" to the production of cotton. However, in view of the effort devoted to this question in the briefs, we think it is appropriate to make a few observations.

In *Harris Farms,* we held that two feedmills operated by a livestock company solely for the purpose of assuring itself a reliable supply of cattle feed, and not for sale to others, were eligible for agricultural rates, and that PG&E had erred by placing the feedmills on commercial rates. Our decision concluded that the feedmills were eligible for agricultural rates because they were "dedicated and integral to a defined agricultural end-use, raising livestock," but also because "the Harris feedmills are as essential a part of cattle raising as the farm shop," which PG&E conceded was eligible for service at agricultural rates. (43 CPUC2d at 241.)

In view of the second quoted ground for our decision, it cannot be said that *Harris Farms* announced a broad rule that *any* activity that might be considered "necessary and integral" to an agricultural end-use should automatically qualify for service under PG&E's agricultural tariffs. This is not surprising, because as PG&E points out, "the feedmills were granted agricultural rates because they were used to raise the livestock," whereas in this case, "cotton ginning is not 'necessary and integral' to the raising of crops," because it occurs after the cotton crop has been harvested. (PG&E Reply Brief, pp. 12-13.)

these refunds for the period beginning three years prior to their requests to PG&E to have the overcharges returned to them.[20] (74 CPUC2d at 682.)[21]

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[20] Each of the complainants first requested refunds of the overcharges in the Fall of 1999. Thus, under the authorities cited in *Producers* (Pub. Util. Code § 736 and D.86-06-035, 21 CPUC2d 270, 278), they are entitled to refunds back to the Fall of 1996. The precise dates of complainants' requests to PG&E are set forth in Chart F, which is attached to the complaint.

[21] In addition to the other arguments discussed above, none of the "public policy" arguments presented in the final portion of PG&E's appeal has convinced us that the result or reasoning in the POD was erroneous.

First, PG&E argues that the POD represents unsound public policy because it "would cause further divergence from Edison's agricultural tariff." (PG&E Appeal, p. 19.) In our view, however, Edison's agricultural tariff is irrelevant to the dispute here, because that tariff focuses on whether the activity in question is performed on or off the farm, not on whether a change of form has occurred. This is clear from the agricultural eligibility statement in Edison's Electric Rule 1, which provides, *inter alia*, that "agricultural power service" is for power "used by a person in connection with the production, harvesting, and preparation for market of agricultural and horticultural products . . . *on land owned and/or operated by such person for the production of agricultural products*." (Emphasis added.) In addition, customers with demands in excess of 500 kilowatts are ineligible for Edison's agricultural tariff wherever they are located. All cotton gins have demands greater than 500 kilowatts when they are operating. (Tr. 80.)

Second, PG&E argues that the POD is unsound because it fails to take into account the rate implications of its holding. Noting that PG&E's agricultural tariffs are aimed at the entire agricultural industry, and that any decision expanding the class of agricultural customers is likely to have far-reaching effects, PG&E maintains that either (1) non-agricultural ratepayers will be required to make up the shortfall in revenues that cotton ginners no longer contribute through commercial rates, and/or (2) agricultural rates will have to be increased to cover the higher costs that an expanded class of agricultural customers will impose on the system. (PG&E Appeal, p. 20.)

However, these arguments could be made in any case that considers agricultural tariff eligibility. Rather than being an argument for ruling the other way, these considerations are an argument -- as PG&E recognizes -- for revisiting the question of agricultural rate eligibility in a general rate case. Indeed, as the discussion in footnote 11 shows, PG&E sought to do just that in A.99-03-014. Ordering paragraph 2 of this decision makes clear that PG&E is obliged to serve the cotton ginners at agricultural

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Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner for this proceeding, and A. Kirk McKenzie is the assigned ALJ and presiding officer.

Findings of Fact

1. On February 8, 2001, the Commission issued D.01-02-038, which extended the 12-month deadline for this proceeding pursuant to Pub. Util. Code § 1701.2(d).

2. After seed cotton is harvested, it is transported in a cotton trailer or module builder to the gin site, where it is stored in a large block prior to ginning.

3. If the moisture content of seed cotton becomes too great, it can cause the cotton fiber to discolor and decompose, and the cottonseed to rot and germinate.

4. Seed cotton must be ginned within approximately a month after harvest, owing to the increase in moisture brought about by decomposition of the leaves, twigs, cottonseed and open bolls in the cotton mass.

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rates only "so long as PG&E's current tariff eligibility statement remains in effect." Thus, PG&E is free to raise the eligibility issue again in a general rate case.

Finally, PG&E argues that a decision in favor of complainants will result in a waste of the real-time meters that were installed for the cotton ginners, and will render the ginners "no longer eligible for the dynamic tariffs being proposed for large commercial customers in R.02-06-001." (PG&E Appeal, p. 22.) These arguments are also without merit. First, as complainants point out, the real-time meters that PG&E claims will be wasted were installed more than a year after this case was filed, by which time the hearing had been held and PG&E was well aware of the relief complainants were seeking. (Complainants' POD Response, pp. 28-29.) Second, although it is true that agricultural customers would not be eligible for the dynamic tariffs that PG&E has proposed for large commercial customers in R.02-06-001, the wisdom of making agricultural customers ineligible for such tariffs is very much an issue in R.02-06-001.

5. After the seed cotton has entered the gin, the first step is to blow warm air through it, which reduces its moisture content and causes some of the dirt, leaves and other debris to fall out.

6. The second step in the ginning process is to remove additional debris by banging the seed cotton around through a series of bars, and then using centrifugal force to sling off twigs and other heavy debris.

7. After the additional debris has been removed, the seed cotton goes to the gin stand, where the cotton fiber is separated from the cottonseed by means of either a saw gin or a roller gin.

8. A saw gin uses a rotating saw to grasp and pull the cotton fiber through narrowly-spaced ribs. Since cottonseed is too large to pass through the ribs, it drops out the bottom and is conveyed to either a seed pile or a truck. Most of the gins in California are saw gins.

9. A roller gin uses a roller to which the seed cotton adheres. As the seed cotton turns on the roller, it is met by a stationary bar and a rotary blade that gently pinches the cottonseed out of the cotton mass.

10. Neither saw gins nor roller gins sever, crush, cut into or otherwise damage either the cotton fiber or the cottonseed.

11. Ginning results in the separation of the cotton fiber from the cottonseed, but the appearance and texture of the cotton fiber and the cottonseed remain the same.

12. In California, the grower retains title to the cotton until after it has been ginned.

13. After the ginned cotton fiber has been baled, it is sold to a cotton merchant, whereas the cottonseed is sold either to feedmills (for use as livestock feed) or oil mills (for production of cottonseed oil).

14. All but two of the 90 gins in California are grower-owned, nonprofit farmers' cooperatives that pay no taxes, charge for ginning on a per-bale basis, and return a dividend to their members only if surplus funds remain at the end of the relevant accounting period.

15. There is no market for unginned cotton (*i.e.*, seed cotton) within California.

16. The eligibility statement in PG&E's current agricultural tariffs provides that a customer will be served under these tariffs if "70 percent or more of the energy use is for agricultural end-uses," which are defined to "include growing crops, raising livestock, pumping water for irrigation, or other uses which involve production for sale, and which do not change the form of the agricultural product."

17. PG&E acknowledges that removing the tops off of carrots, removing the stems from sun-dried raisins, washing potatoes and carrots, and the waxing of apples are all eligible for agricultural rates under this eligibility statement, even though each of these activities changes the form of the agricultural product to some degree.

18. The code assigned to cotton ginning by the 1987 SIC Manual is 0724, which places it within the "crop services" industry group.

19. Since the elimination in D.88-12-031 of the on-the-farm / off-the-farm distinction from PG&E's agricultural tariff, differences have arisen between how certain agricultural processes are treated by the SIC Manual, and how PG&E treats these processes for purposes of determining agricultural rate eligibility.

20. From 1988 until the mid-1990s, a consensus existed between PG&E and its customers about which agricultural processes constituted a "change of form of the agricultural product" under PG&E's eligibility statement, and which did not.

21. On July 30, 2002, complainants and PG&E filed a stipulation in the PG&E bankruptcy proceeding pending in United States Bankruptcy Court for the

Northern District of California, Case No. 01-30923 DM. This stipulation provides, among other things, that to the extent the automatic stay provisions of 11 U.S.C. § 362 are applicable to this proceeding, complainants and PG&E shall have immediate relief from such provisions to prosecute this proceeding through final judgment at the Commission, and any appeal thereof.

22. On December 16, 2002, PG&E filed a timely appeal of the POD that had been mailed to all parties on November 15, 2002. On January 7, 2003, complainants filed a timely response to PG&E's appeal of the POD.

Conclusions of Law

1. Even though the change-of-form language in PG&E's agricultural tariff eligibility statement can be considered subjective and imprecise, the Commission's duty in this case is to construe the tariff language as written.

2. The argument for treating cotton ginning as a change of form under PG&E's agricultural eligibility statement is somewhat stronger than the argument for treating fluid milk processing in that way, because (a) it would be more difficult to recombine cotton fiber and cottonseed than to recombine the various milk products that result from fluid milk processing, and (b) unginned cotton decomposes less rapidly than unpasteurized milk.

3. Under *Producers,* in order to determine whether a process results in a "change of form" in the applicable agricultural product under PG&E's current tariff eligibility statement, it is reasonable to engage in a before-and-after comparison of the elements that make up the raw agricultural product, such as the various milk products that comprise raw milk, or the cotton fiber and cottonseed that comprise seed cotton.

4. Under *Producers,* whether a market exists for the unprocessed form of a particular agricultural product is relevant to determining whether that process should be considered a change of form of the product.

5. PG&E conceded that for purposes of applying its agricultural eligibility statement, ginning should be considered part of the “production for sale” of cotton.

6. Carrot topping, raisin de-stemming and removing leaves from fruits and vegetables result in a change-of-form of these products under a common-sense definition of the term, so PG&E’s decision to extend eligibility for agricultural rates to these processes is inconsistent with PG&E’s decision to withhold such eligibility from cotton ginning.

7. Cotton ginning is not analogous to removing the pits from peaches and apricots, because pit removal involves cutting into these fruits, and thus changes their form.

8. Cotton ginning results in a separation of the cotton fiber from the cottonseed.

9. Cotton ginning is not analogous to the slaughtering of animals, because the latter clearly and drastically changes the form of the live animal.

10. Because cotton ginning results in the separation of the cotton fiber from the cottonseed without doing damage to either of them, ginning does not "change the form of the agricultural product" within the meaning of PG&E’s current agricultural tariff eligibility statement.

11. Because cotton ginning is eligible for agricultural rates under PG&E’s current agricultural eligibility statement, complainants are entitled to a refund equal to the difference between what they have been billed for their ginning activities under PG&E’s commercial tariffs and what they should have been billed for these activities under PG&E’s agricultural tariffs.

12. Each complainant should receive the refund described in the preceding Conclusion of Law for the period beginning three years prior to the date on

which the complainant formally requested such a refund from PG&E, as set forth in Chart F attached to the complaint in this proceeding.

13. Complainants should receive electrical service from PG&E for their cotton ginning activities at the applicable agricultural rate so long as PG&E's current agricultural tariff eligibility statement remains in effect.

14. None of the arguments presented in PG&E's December 16, 2002 appeal of the POD in this case justifies a change in the reasoning or outcome set forth in the POD.

O R D E R

IT IS ORDERED that:

1. Within 90 days after the mailing date of this decision, Pacific Gas and Electric Company (PG&E) shall refund to each complainant in this proceeding, for the period beginning three years prior to the date set forth under the column labeled "refund request date" in Chart F attached to the complaint herein, an amount equal to the difference between what such complainant was billed for its cotton ginning activities under the commercial tariff that PG&E applied, and what such customer should have been billed for its cotton ginning activities under PG&E's applicable agricultural tariff.

2. PG&E shall provide electrical service for cotton ginning activities to each complainant herein at PG&E's applicable agricultural rate so long as PG&E's current agricultural tariff eligibility statement remains in effect.

3. This proceeding is closed.

This order is effective today.

Dated April 17, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
SUSAN P. KENNEDY
Commissioners

I will file a partial dissent.

/s/ LORETTA M. LYNCH
Commissioner

I dissent.

/s/ GEOFFREY F. BROWN
Commissioner

APPENDIX A

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(Proposed Agricultural Tariff Applicability Statement Appearing in Chapter IV of the March 9, 2000 Update to PG&E's Rate Design Testimony in Phase II of A.99-03-014)

An account will be served under this rate schedule if the account's maximum billing demand exceeds 100-kW for at least three consecutive months during the most recent 12-month period. This schedule is not applicable to service for which a residential schedule is applicable. This schedule is not applicable to accounts where more than 30 percent of the energy used on the account is for processes or processing, as defined below, which change the form of any or all of the following: (1) a live animal, (2) fresh whole fruit, (3) fresh whole vegetables, (4) fresh whole grapes, (5) unhulled nuts, (6) unhulled grain, or (7) fresh whole berries. Processing includes condensing, crushing, cutting, dehydrating, drying other than for immediate preservation, hulling, shelling, ginning cotton, juicing or squeezing, milling, and pitting and other activities which change the form of the agricultural product.

This rate schedule is applicable to accounts where the following criteria are met:

1. Seventy percent or more of the electrical energy usage delivered by PG&E on the account is for one or more of the following agricultural activities:

    a. Pumping water for irrigation or frost protection of crops or for reclamation of agricultural land.

    b. Raising of livestock up to but not including the point that the animal is slaughtered for its meat or pelt.

    c. Cleaning, sorting, grading, packing and storage of whole fresh fruits, whole fresh vegetables, whole fresh berries, whole fresh grapes and live plants, and other whole, fresh, uncooked plant products prior to shipment to market.

    d. Removal of stems and leaves (but not hulls, shells or pits) from whole fresh fruits, whole fresh vegetables, whole fresh grapes and berries and unhulled nuts and other whole, fresh, uncooked plant products prior to shipment to market.

    e. Manufacture of ice where the ice is not sold, but is used by the manufacturer for the immediate icing of vegetables prior to shipment to market.

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f. Dairy farming and fluid milk processing, excluding the processing of milk into cheese, yogurt, lactose-free milk, chocolate milk or other products which do not have the appearance and physical characteristics of fluid milk.

g. Cleaning, packing, grading, sorting and storage of eggs, prior to shipment to market.

h. Drying of unhulled whole grain and unhulled nuts to prevent immediate spoilage.

i. Raising of crops for sale or live plants for sale in a greenhouse.

j. Operating a facility such as farm office operation, feedmill or compost production facility where:

   (i) the product or service produced by the operation is not for sale,

   (ii) the product or service is integral to the raising and growing of a plant or livestock, and

   (iii) the customer of record for the integral operation is the same as the customer of record for the agricultural electric account which provides electricity for the raising of the plant or livestock.

2. The live animal, fresh whole fruit, fresh whole vegetables, fresh whole grapes, unhulled nuts, unhulled grain, fresh whole berries, or other whole, fresh, uncooked plant product -- or a subsequent product derived therefrom -- must be sold for profit.

So long as a minimum of 70 percent of the energy use on the account is for agricultural activities described in 1 and 2 above, the remainder of the electrical energy usage on the account may be employed with no restrictions.

Existing transition period agricultural customers with maximum billing demand exceeding 100 kW for at least three consecutive months will be placed on the modified Schedule AG-5 on a grandfathered basis. New agricultural accounts qualifying under this rate schedule after the freeze will be placed on Schedule AG-5 subject to the new applicability criteria as set forth herein.

(END OF APPENDIX A)